STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

May 9, 2006

TO: PARTIES OF RECORD IN APPLICATION 05-04-020

Decision 06-04-075 is being mailed without the Concurrence of Commissioner Dian M. Grueneich. The concurrence will be mailed separately.

Very truly yours,

Angela K. Minkin, Chief
Administrative Law Judge

AKM:mal

Attachment

228131

Decision 06-04-075 April 27, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Verizon Communications, Inc. ("Verizon") and MCI, Inc. ("MCI") to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI.	A.05-04-020 (Filed on April 21, 2005)

ORDER DENYING REHEARING OF DECISION (D.) 05-11-029

I. INTRODUCTION

In the Order we dispose of the applications for rehearing of Decision (D.) 05-11-029 ("Decision") filed by The Utility Reform Network ("TURN") and the Office of Ratepayer Advocates ("ORA")[1] jointly, and by Verizon Communications, Inc. ("Verizon") and MCI, Inc. ("MCI") jointly.

In Application (A.) 05-04-020 Verizon and MCI (collectively "Applicants") sought approval of the transfer of control of MCI's California utility subsidiaries to Verizon.

Neither Verizon nor MCI are regulated telephone companies within California. However, both holding companies own California subsidiaries which are subject to public utility regulation by the Commission. Verizon California is an incumbent local exchange carrier ("ILEC") and all of MCI's California subsidiaries are

[1] Subsequent to filing the application for rehearing, Senate Bill 608 (Stats. 2005, ch. 440, § 1.) took effect renaming ORA as the Division of Ratepayer Advocates.

non-dominant inter-exchange carriers ("NDIECs") and competitive local exchange carriers ("CLECs").[2]

Under the proposed transaction, MCI would become a subsidiary of Verizon. The MCI California subsidiaries would remain subsidiaries of MCI and subject to the authorizations and licenses currently held by MCI California. The proposed transaction would not merge any of the assets, operations, lines, plants, franchises, or permits of Verizon and MCI. In addition, the proposed transaction would not affect the regulatory authority of the Commission over the Applicant's California subsidiaries, or call for any change in the rates, terms, or conditions for the provision of any communications services provided in California.

On September 19, 2005, the Assigned Commissioner issued a ruling denying motions for evidentiary hearings and determining the applicability of Public Utilities Code Section 854[3] to the proposed transaction ("ACR"). The ACR determined that while the proposed transaction was subject to Section 854(a),[4] it was appropriate to apply Section 853(b)[5] to exempt the transaction from review under Sections 854(b)[6] and

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[2] In this Order, the abbreviations "ILEC" refer to an incumbent local exchange carrier, "CLEC" refer to a competitive local exchange carrier, and "NDIEC" refer to a non-dominant inter-exchange carrier.

[3] All other section references are to the Public Utilities Code, unless otherwise stated.

[4] Section 854(a) provides in pertinent part:

> No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission. (Pub. Util. Code, § 854, subd. (a).)

[5] Section 853(b) provides:

> The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a

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(c).[7] However, the ACR also determined that for purposes of Commission review of the transaction it was consistent with past merger cases granting a Section 853(b) exemption

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> proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers. (Pub. Util. Code, § 853, subd. (b).)

[6] Section 854(b) provides:

> Before authorizing the merger, acquisition, or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars ($500,000,000), the commission shall find that the proposal does all of the following:
>
> (1) Provides short-term and long-term economic benefits to ratepayers.
>
> (2) Equitably allocates, where the commission has ratemaking authority, the total short-term and long-term forecasted economic benefits, as determined by the commission, of the proposed merger, acquisition, or control, between shareholders and ratepayers. Ratepayers shall receive not less than 50 percent of those benefits.
>
> (3) Not adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result. (Pub. Util. Code, § 854, subd. (b).)

[7] Section 854(c) provides:

> Before authorizing the merger, acquisition, or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the entities that are parties to the proposed transaction has gross annual California revenues exceeding five hundred million dollars ($500,000,000), the commission shall consider each of the criteria listed in paragraphs (1) to (8), inclusive, and find, on balance, that the merger, acquisition, or control proposal is in the public interest,
>
> (1) Maintain or improve the financial condition of the resulting public utility doing business in the state.
>
> (2) Maintain or improve the quality of service to public utility ratepayers in the state.
>
> (3) Maintain or improve the quality of management of the resulting public utility doing business in the state.

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to use the criteria under Section 854(c) as guidelines for determining whether the transaction is in the public interest, and also to include a broad discussion of antitrust considerations.

Consistent with the parameters for review established in the ACR, in D.05-11-029 we granted the proposed transaction between Verizon and MCI subject to three conditions.[8] The three conditions as stated under the Decision are:

1. Verizon shall, by February 28, 2006, cease forcing customers to separately purchase traditional local phone service as a condition for obtaining digital subscriber line ("DSL") service (this condition is commonly known as a requirement to provide "naked DSL"). We further order that no later than February 28, 2006, Verizon shall submit an affidavit evidencing compliance with this condition of the merger.
2. Applicants shall adopt the agreement that Verizon California negotiated with The Greenlining Institute and Latino Issues Forum ("Greenlining Agreement"). Under the key terms of this agreement, the Applicants agree to:
   a) Participate in a statewide Broadband Task Force.

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(4) Be fair and reasonable to affected public utility employees, including both union and nonunion employees.

(5) Be fair and reasonable to the majority of all affected public utility shareholders.

(6) Be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility.

(7) Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state.

(8) Provide mitigation measures to prevent significant adverse consequences which may result. (Pub. Util. Code, § 854, subd. (c).)

[8] Not including conditions previously imposed by the Federal Communications Commission ("FCC") approval of the transaction and upon which D.05-11-029 relies, in part, in reaching its determination. See Memorandum Opinion and Order, *In the Matter of Verizon Communications, Inc. and MCI, Inc. Applications for Transfer of Control* ("*Verizon/MCI merger Order*"), WC Docket No. 05-57 (rel. November 17, 2005).

b) Increase corporate philanthropy over the next five years by an additional $20 million above current levels, with a good faith effort to maintain the aggregate contributions to minorities and underserved communities in a manner consistent with its past practice.

c) Make a good faith effort to increase the supplier diversity goal for minority business enterprises from the current 15% to a minimum of 20% by 2010. To achieve this goal, Verizon California anticipates spending $1 million over five years in technical assistance to minority businesses and another $1 million to develop Verizon's internal infrastructure devoted to such efforts.

3. Applicants shall commit $3 million per year for five years in charitable contributions ($15 million total) to a non-profit corporation, the California Emerging Technology Fund ("CETF"), to be established by the Commission for the purpose of achieving ubiquitous access to broadband and advanced services in California, particularly in underserved communities, through the use of emerging technologies by 2010. No more than half of Applicant's total commitment to the CETF may be counted toward satisfaction of the Applicant's commitment in the Greenlining Agreement to increase charitable contributions by $20 million over five years.

On December 5, 2005, joint applications for rehearing were filed by TURN and ORA, and by Verizon MCI. TURN and ORA challenge the Decision on the grounds that: (1) it improperly exempts the transaction from review under Public Utilities Code Section 854; (2) it commits legal error because it "cherry picks" particular Public Utilities Code Sections, imposes a new burden of proof, and accords inappropriate weight to the Attorney General Opinion ("AG Opinion"); (3) it makes numerous errors with respect to Sections 1705 and 1757; (4) it denies adequate due process by imposing an unreasonable procedural schedule and dispensing with hearings; and (5) it circumvents Rule 51 in its treatment of the settlement with The Greenlining Institute (“GL”) and The Latino Issues Forum (“LIF”). Verizon and MCI challenge the Decision on the grounds that: (1) it acts in excess of Commission jurisdiction in adopting the condition requiring Verizon to provide “naked DSL” service.

A response to the TURN and ORA application for rehearing was filed by The Greenlining Institute and by Verizon and MCI (jointly). A response to the Verizon and MCI application for rehearing was filed by Earthlink, Inc., and TURN and ORA (jointly).

We have carefully considered each and every argument raised in the joint applications for rehearing and are of the opinion that good cause does not exist to grant rehearing. Accordingly, the joint applications for rehearing of D.05-11-029 filed by TURN and ORA, and by Verizon and MCI are denied.

II. DISCUSSION

A. Exemption From Section 854 Review

TURN and ORA contend that the Decision improperly grants a Section 853(b) exemption from the merger review standards under Section 854(b) and (c). TURN and ORA state this is a departure from all other decisions involving an ILEC merger, for which the Commission did conduct review of the proposed transactions under Section 854 (b) and (c). In particular, TURN and ORA contend the Decision errs because: a) exemptions are only permissible in “extraordinary circumstances;” b) the three justifications for the exemption stated by the Decision are inaccurate and unsupported; and c) it ignores compelling legal and policy reasons supporting Section 854 review. (TURN/ORA Rhg. App., pp. 6-26.) Each of these arguments is discussed below.

1. Circumstances Warranting Exemption From Section 854 Review

TURN and ORA argue that the Decision errs in granting an exemption from Section 854 review because it did not apply the proper test for granting a Section 853(b) exemption. TURN and ORA assert that the Commission must establish "extraordinary circumstances" to grant an exemption and that this same test applies for granting an exemption from approvals requested under both Section 851 and 854. (TURN/ORA Rhg. App., pp. 9-12.) This argument is incorrect.

TURN and ORA allege that the Decision takes an overly selective approach which cites only certain past Commission authority to support granting an exemption in this case. (TURN/ORA Rhg. App., p 13.) Yet in arguing that we should have used the "extraordinary circumstances" test, TURN and ORA almost exclusively rely upon exemption cases pertaining applications for approval under Section 851 – not merger cases approved under Section 854. Similarly, TURN and ORA simply enumerate cases in which the Commission has conducted a full Section 854 merger review to suggest a full review must also be performed in this case. TURN and ORA argue we exercised our authority to exempt transactions from review pursuant to Section 853(b) in a "*carte blanche*" manner. However, this argument disregards the analytical approach we previously authorized, and applied in this case, in granting Section 853(b) exemptions for merger applications.[9]

Our Decision relies on several cases which establish our broad discretion to grant a Section 853(b) exemption, when evaluated on a case-by-case basis, as well as cases illustrating where such exemptions have been applied to merger applications. (D.05-11-029, pp. 15-18, and Appendix A.) However, we noted three cases in particular

[9] TURN and ORA also allege the Decision claims to have "unfettered" power to grant an exemption. (TURN/ORA Rhg. App., p. 10.) However, this claim is not supported by D.05-11-029, which notes only the Commission's broad authority, case-by-case evaluation, and the application of established principles to grant an exemption. (D.05-11-029, p. 17.)

to illustrate the current exemption test commonly applied in merger proceedings.[10] These cases applied three key principles: 1) does the transaction involve putting together two traditionally regulated telephone systems; 2) does the Commission exercise ratemaking authority as contemplated by Section 854(b) to allow allocation of benefits to ratepayers; and 3) do the requirements in Section 854(b) fit to allow allocation of merger benefits or alternatively, have the involved entities grown under competitive forces at the sole risk of shareholders. (*Merger of MCI/BT* [D.97-05-092], *supra*, pp. 664-665.)

The September 19, 2005 ACR used these exact three principles in determining the transaction was exempt from Section 854 review. Our Decision also notes these and relies on them, though altering the descriptive headings of the text for our own discussion purposes. Nevertheless, the underlying factual inquiry is consistent with that of the prior merger decisions. Accordingly, the Decision reasonably relies upon an existing and applicable exemption test in this case. (D.05-11-029, pp. 21-28.)

TURN and ORA cite to *WorldCom Bankruptcy* to assert that merger cases do in fact apply the "extraordinary circumstances" test.[11] However, this assertion is somewhat misleading. In *WorldCom Bankruptcy*, we granted exemptions from review under both Sections 851 and 854. Accordingly, we did note the "extraordinary circumstances" test related to the Section 851 aspect of the case. (*Id.*, p. 6 (slip op.).) However, we also went on to discuss Section 854 review and used neither the

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[10] *In the Matter of the Joint Application of MCI Communications Corporation (MCIC) and British Telecommunications plc (BT) for All Approvals Required for the Change in Control of MCIC's California Certificated Subsidiaries That Will Occur Indirectly as a Result of the merger of MCIC and BT* ("*Merger of MCIC/BT*") [D.97-05-092] (1997) 72 Cal.P.U.C. 2d 656, 1997 Cal. P.U.C. LEXIS 340; *In re Application of WorldCom, Inc. and MCI Communications Corporation for Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc.* ("*Merger of MCI/WorldCom*") [D.98-08-068] (1998) 81 Cal.P.U.C. 2d 704, 1998 Cal. P.U.C. LEXIS 912; and *In the Matter of the Joint Application of AT&T Corp., Meteor Acquisition Inc., and MediaOne Group, Inc. for Approval of the Change in Control of MediaOne Telecommunications of California, Inc. That Will Occur Indirectly as a Result of the Merger of AT&T Corp. and MediaOne Group, Inc.* ("*Merger of AT&T/MediaOne*") [D.00-05-023] (2000) __ Cal.P.U.C. 3d __, 2000 Cal. P.U.C. LEXIS 355.

[11] *In re Application of WorldCom, Inc. Pursuant to Public Utilities Code Section 853(b) for Exemption from the Requirements of Sections 851 and 854 of the Public utilities Code With Respect to its Bankruptcy Reorganizations ("WorldCom Bankruptcy")* [D.03-11-015] (2003) __ Cal. P.U.C. 3d __, 2003 Cal. P.U.C. LEXIS 554.

"extraordinary circumstances" test nor the three principles enumerated in the above mentioned merger cases to grant the exemption. In *WorldCom Bankruptcy* we found four different factors relevant in granting the exemption: 1) the transaction changes no rates or terms of service for existing customers and the Commission retains full authority to review any such changes in the future; 2) the Company is taking extraordinary steps to change the practices of the past; 3) evidence that the transaction is in the public interest is strong; and 4) the Commission and the commissions of several other states have stipulated in the bankruptcy proceeding to use their best efforts to act on WorldCom's state applications by a specific date. (*Id.*, pp. 6-7 (slip op.).)

Then in *Merger of WorldCom/Intermedia*, we rejected any hard and fast rule applicable to exemptions and instead stated that Section 853(b) gives the Commission discretion to decide on a case-by-case basis whether the exemption is appropriate.[12] In *Merger of WorldCom/Intermedia* we determined it appropriate to apply another set of factors in determining to grant an exemption. Specifically, that: 1) at least as to the Internet backbone, the merger will simply preserve the status quo at least until subsequent transactions are concluded and the merger will preserve Intermedia as a player in the California market; 2) Intermedia primarily serves business customers, a market where there is a great deal of competition; and 3) Intermedia has a small number of customers, dollar revenues, and employees in California. (*Id.*, pp. 4-5 (slip op.).)

Indeed, there is no one hard and fast test which must be applied in granting an exemption pursuant to Section 853(b). We have looked to differing factors, depending upon the particular facts of a case and the situation at hand. In this Decision we relied on a set of factors we have repeatedly used in granting exemptions from Section 854 review. Accordingly, there is no legal error.

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[12] *In re Request of WorldCom, Inc. and Intermedia Communications, Inc., for Approval to Transfer Control of Intermedia Communications Inc. and its Wholly-Owned Subsidiary to WorldCom, Inc.* ("*Merger of WorldCom/Intermedia*") [D.01-03-079] (2001) __ Cal.P.U.C. 3d __, 2001 Cal. P.U.C. LEXIS 219, pp. 3-4 (slip op.).

2. The Justifications For Exemption Under The Decision

TURN and ORA broadly argue that the three prong test used by the Decision to exempt the merger from Section 854 review errs because it is not based on the record, it is factually incorrect, and it does not consider the public interest. (TURN/ORA Rhg. App., p. 15.)

As discussed above, the Decision granted a Section 853(b) exemption based on an evaluation of three principles similar to those used in *Merger of MCIC/BT*, *Merger of MCI/WorldCom*, and *Merger of AT&T/MediaOne*. The principles we evaluated in the Decision are: 1) specific characteristics of the merger applicants; 2) the state and impact on the market as a whole; and 3) the likelihood that competitive pressures and our regulatory regime will cause benefits achieved through the combination to flow through to customers. (D.05-11-029, p. 21.) The inquiry under these principles was conducted in a manner to comport with the principles in the prior merger cases where we looked generally to: 1) whether the transaction involves combining traditionally regulated companies; 2) the nature of the Commission's ratemaking authority; 3) and whether the allocation of benefits to ratepayers fits or whether the entities have grown under competitive forces at the sole risk of shareholders.

a. Specific Characteristics of the Merger Applicants

TURN and ORA contend the Decision's analysis under this prong errs because: 1) it cites no case where a Section 853(b) exemption has been granted in a transaction involving an ILEC; 2) most other merger transactions were relatively small from a financial perspective; and 3) most other cases were non-controversial. (TURN/ORA Rhg. App., pp. 16-17.)

In analyzing the first prong, the Decision demonstrates how this transaction qualifies for exemption by noting facts such as: the holding companies which are the subject of this merger are not regulated by the Commission as public utilities; while the California subsidiaries of each company are regulated public utilities in California, none are subject to traditional cost-of-service rate regulation; all of MCI's California subsidiaries are non-dominant interexchange carriers (NDIECs or CLECS); and while Verizon California is an ILEC, post-merger the revenues of the combined company will account for only 2.7 to 3 percent of the combined company's revenues. Thus, we reasoned that California interests are not uniquely affected. (D.05-11-029, pp. 22-23.) We also noted that MCI has grown (and shrunk) under competitive market forces at the sole risk of its shareholders, as well as the fact that many services provided by the California subsidiaries of both Verizon and MCI are not subject to regulation by this Commission, such as interstate communications and information services. (D.05-11-029, pp. 27-28.)

The three arguments raised by TURN and ORA are not convincing for purposes of determining whether the first prong of the test was met or whether it was lawful for the Decision to exempt the proposed transaction from Section 854 review. Accordingly, there is no legal error.

b. The State and Impact on the Market as a Whole

TURN and ORA contend the Decision's analysis under this prong errs because it improperly declined to review competitive issues on the grounds that the Opinion of the Attorney General on Competitive Effects of the Proposed Merger of Verizon, Inc. and MCI Inc. ("AG Opinion") resolved those questions. TURN and ORA argue the Decision dismissed the record in the proceeding, particularly with respect to issues of market concentration and intermodal alternatives. (TURN/ORA Rhg. App., pp. 17-18.) This argument is flawed for several reasons.

The statutory requirement to assess the competitive effects of a merger exists only when the Commission conducts a full review under Section 854. Specifically, Section 854(b)(3) requires that the Commission find that the merger proposal:

> Not adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be

> adopted to avoid this result. (Pub.Util. Code, § 854, subd. (b)(3).)

Because the Decision lawfully granted a Section 853(b) exemption, the statutory requirement to review the potential competitive effects of the transaction was not triggered in this case.

Nevertheless, in this case we did determine that despite granting the exemption, it was relevant to conduct a broad review of competitive issues. This approach is consistent with past Commission merger cases also granting an exemption. In conducting this broad review, it is reasonable to rely in great part on the AG Opinion because the Legislature specifically charged the Attorney General with responsibility for evaluating the issue for use by the Commission. Moreover, the law establishes that the Attorney General's opinion and advice is entitled to great weight.[13]

TURN and ORA are wrong that we ignored evidence in the record. Our Decision discusses the competitive issues for each relevant market, and identifies the conclusion of the Attorney General, the position of the applicants, and the positions of the other parties. The Decision then states the basis upon which we determined to accept or reject particular conclusions. (D.05-11-029, pp. 45-79.) It was not legal error, or without consideration of the record, to look to the AG Opinion. The AG Opinion was based on testimony and evidence in the record of this proceeding, relevant FCC precedent, and the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines and the April 8, 1997 revisions ("Merger Guidelines"). (AG Opinion, pp. 3, 7-9.)[14] There is no basis to conclude the Decision failed to review the competitive issues or consider the evidence in the record.

Finally, TURN and ORA reassert that their conclusions are correct with respect to mass market customers and intermodal competition, and argue we should have

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[13] See *Moore v . Panish* (1982) 32 Cal. 3d 535; *Farron v. City and County of San Francisco* (1989) 216 Cal.App. 3d 1071; *Unger v. Superior Court* (1980) 102 Cal.App. 3d 681.

[14] In this Order all citations to the AG Opinion, briefs, and exhibits refer to the public rather than redacted versions.

come to the same conclusion. (TURN/ORA Rhg. App., p. 18.) As discussed in Section III a) of this Order, our findings regarding these issues were well founded in record evidence, FCC precedent and the *Merger Guidelines.* TURN and ORA merely ask that we reweigh evidence in the record. We considered these issues and TURN and ORA's positions, and stated the reasons for rejecting those arguments. (D.05-11-029, pp. 48-60.) TURN and ORA offer no legal basis to require such a reweighing of evidence. Accordingly, for the reasons stated above, there is no legal error.

c. The Likelihood That Competitive Pressures and Regulatory Regime Will Deliver Benefits

TURN and ORA contend the Decision's analysis under this prong errs because it fails to determine whether the proposed transaction will produce short-term and long-term benefits as required by Section 854(b)(1). TURN and ORA argue that there will "likely" be no short-term benefits from the merger nor will there be market incentives to force the companies to pass benefits to ratepayers, thus the transaction is "likely" not in the public interest. (TURN/ORA Rhg. App., pp. 18-24.) As explained below, these arguments are without merit.

TURN and ORA predicate their argument on the position that we must apply Section 854(b)(1) to assess and allocate short-term and long-term benefits of the transaction. However, this argument is incorrect. Our Decision lawfully granted an exemption from Section 854 review. Thus, the statutory requirement to identify specific short-term and long-term benefits of the transaction under Section 854(b)(1) was not triggered in this case.

As previously discussed, the third prong of the exemption test generally looks to whether a finding and allocation of merger benefits fits or whether the entities have grown under competitive forces. In relevant past Commission merger exemption cases, this prong has been satisfied if the entities involved, or at least the acquired entity, is determined to have grown under competitive forces at the sole risk of shareholders without a captive ratepayer base.[15] Related to this prong, our Decision here finds that MCI, the entity to be acquired in this case, has grown under competitive market forces at the sole risk of its shareholders and has no captive ratepayer base. (D.05-11-029, pp. 24, 120 [Finding of Fact 13.].) With this finding, we reasonably satisfied the three prong exemption test established under prior cases.

TURN and ORA do not allege that we failed to satisfy the established exemption test, but instead focus on our statements noting that the new regulatory regime under the New Regulatory Framework ("NRF") and the 1996 Telecommunications Act depends more on market forces than the distribution of benefits through traditional ratemaking mechanisms. (D.05-11-029, pp. 26-27.) The Decision states that we no longer retain traditional cost-of-service based ratemaking authority over the utilities as was in place when Section 854 was enacted, and thus surmises that the current price-cap based structure will force Verizon to achieve efficiency gains likely resulting in the distribution of benefits to customers. (*Id.*)

Focusing on that discussion, TURN and ORA cite to cases such as *Merger of Pacific Telesis/SBC* to point out that the Commission has allocated short and long-term benefits since the inception of NRF.[16] In addition, TURN and ORA state that we have used a sur-credit mechanism to flow benefits to ratepayers during the time the NRF has been in place. (TURN/ORA Rhg. App., pp. 20- 21.) However, this argument is misleading.

First, it suggests that because some merger cases have allocated benefits subsequent to NRF, all merger cases must do so. The cases TURN and ORA rely on were standard Section 854 review cases. They did not consider whether granting a Section 853(b) exemption was appropriate and provide no guidance regarding whether an allocation of short and long-term benefits is required in such circumstances. That we

[15] See *Merger of MCIC/BT* [D.97-05-092], *supra*, p. 11 (slip op.); *Merger of AT&T/MediaOne* [D.00-05-023], *supra*, p. 18 (slip op.); *Merger of MCI/WorldCom* [D.98-08-068] , *supra*, pp. 10-11 (slip op.).

[16] *Re Pacific Telesis Group* ("*Merger of Pacific Telesis/SBC*") [D.97-03-067] (1997) 71 Cal. P.U.C. 2d

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may have allocated short-term and long-term benefits since the inception of NRF does not create a legal requirement for the Commission to do so in all cases.

Second, it suggests the Decision relied solely on the comments regarding NRF and the current competitive market structure to grant the exemption. That is wrong. We concluded that the proposed transaction was exempt based on established exemption principles.

TURN and ORA are also mistaken that we did not allocate benefits because it is too difficult to do so. (TURN/ORA Rhg. App., pp. 22-23.) To make this claim, TURN and ORA quote snippets of the Decision language which states: "the difficulty of adjudicating the benefit amount" and "[a]ny such Commission calculation of merger benefits would be time-consuming, costly, and highly speculative." (TURN/ORA Rhg. App., p. 22.)

This language was taken from a larger discussion regarding Section 853(b) exemption principles in which we reflected upon a range of regulatory and competitive changes. In that context, we observed that the difficulty of adjudicating benefit amounts in the traditional manner can be demonstrated by the wide disparity of estimates provided by the parties, complications resulting from the international scope and scale of the companies involved in this case, and the fact that the companies offer services not regulated by the state. (D.05-11-029, pp. 27-28.) Making such an observation does not constitute legal error or establish that we relied upon this observation to make its determination. We granted an exemption from Section 854 review consistent with the relevant exemption criteria, and did not go on to assess specific short-term and long-term benefits because we were not required to do so.

TURN and ORA claim the proposed merger will "almost certainly" not produce short-term benefits, and thus will "likely" not be in the public interest.

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(TURN/ORA Rhg. App., p. 19.) For the reasons stated above, it was not necessary for the Decision to analyze short-term benefits.

In addition, TURN and ORA err in suggesting that the issue of short-term benefits is determinative of whether the transaction is in the public interest. (TURN/ORA Rhg. App., p. 19.) The issue of short-term benefits is found under Section 854(b)(1). The test for determining whether the transaction is in the public interest is separate, and found under Section 854(c). Whether the transaction will result in short-term benefits is not an element under that public interest test. Generally, we are not required to use this eight factor test where it has granted a Section 853(b) exemption. However, in this Decision, as in certain other decisions granting an exemption, we used the more inclusive eight factors as a guide to make a broad showing that the transaction is in the public interest. (D.05-11-029, pp. 79-106.) The Decision concludes that based on our examination of the eight criteria, the competitive impacts of the merger, and the proposals of other parties, the proposed merger is in the public interest. (*Id.*) However, it is properly considered apart from the issue of short-term economic benefits.

Finally, TURN and ORA cite to testimony each presented in the proceeding to argue that there are no market incentives to force the merged companies to pass along merger benefits to consumers. (TURN/ORA Rhg. App., p. 23.) In resubmitting this testimony TURN and ORA ask the Commission to reweigh the evidence in the record. There is no legal basis to require such a reweighing. Accordingly, for the reasons stated above, there is no legal error.

d. Legal and Policy Reasons for Section 854 Review

TURN and ORA contend that the Decision errs because it ignores two controlling cases, which would require a full Section 854 review if applied to the Verizon/MCI merger proposal. These are *Merger of SBC/Telesis* and *Merger of GTE/Bell Atlantic*.[17] (TURN/ORA Rhg. App., pp. 24-26.)

[17] *Re Pacific Telesis Group* (*"Merger of SBC/Telesis")* [D.97-03-067] (1997) 71 Cal.P.U.C. 2d 351; and *In the Matter of the Joint Application of GTE Corporation ("GTE") and Bell Atlantic Corporation ("Bell*

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These cases are not factually or legally controlling in this instance. *Merger of SBC/Telesis* involved SBC's acquisition of Telesis. After the merger, Telesis' subsidiary Pacific would continue as a subsidiary of Telesis. The Commission determined that although the transaction was technically structured as a merger between the two holding companies, the primary reason for the merger was for SBC to acquire Telesis' subsidiary Pacific. Pacific represented over 90% of Telesis' assets as California's largest provider of local basic service. (*Merger of SBC/Telesis* [D.97-03-067], *supra*, pp. 364-365.) For that reason the Commission determined to "pierce the corporate veil" and subject the transaction to full Section 854 review.

The September 19, 2005 Assigned Commissioner's Ruling ("ACR") specifically addressed *Merger of SBC/Telesis* and determined it was not comparable to Verizon's acquisition of MCI such as to warrant piercing the corporate veil. The ACR discussed several reasons why the factual scenario does not trigger a similar approach, among them that the principal reason stated for pursuing the transaction is the addition of MCI's national and global enterprise market and fiber network, only a small portion of which is located in California. Thus, the number of MCI access lines in California to be added to Verizon's access lines as a result of the transaction is *de minimus.* (ACR, pp. 10-11.) Because the facts here are distinguishable and because TURN and ORA offer no information or argument to establish how the treatment in *Merger of SBC/Telesis* is applicable here, this case is not relevant.

Merger of GTE/Bell Atlantic is also not dispositive for purposes of analyzing the facts of this case. Again, TURN and ORA offer no information to establish how the facts in *Merger of GTE/Bell Atlantic* are comparable to the transaction at issue here. In *Merger of GTE/Bell Atlantic*, the question of whether to grant a Section 853(b)

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Atlantic") to Transfer Control of GTE's California Subsidiaries to Bell Atlantic, Which Will Occur Indirectly as a Result of GTE's Merger with Bell Atlantic ("*Merger of GTE/Bell Atlantic*") [D.00-03-021] (2000) 2000 Cal. P.U.C. LEXIS 398.

exemption was not raised or considered. As such, the case is not meaningful regarding the application of Section 854(b) and (c).

Finally, TURN and ORA argue that this merger should have been subject to full Section 854 review because it has much larger and long-term implications compared with other mergers, in particular due to the concurrent merger proposed by SBC and AT&T. TURN and ORA argue this will cause a fundamental and historic shift in the competitive make-up of the industry. (TURN/ORA Rhg. App., p. 26.) However, this is a policy argument and does not establish that the Decision was unlawful. Thus, for the reasons stated above, TURN and ORA have failed to establish legal error.

B. "Cherry Picking," Burden of Proof, and the Attorney General Opinion

TURN and ORA contend that the Decision errs because: a) it "cherry picks" particular Public Utilities Code Sections in order to reach a preordained outcome; b) it imposes a new burden of proof at the end of the proceeding that intervenors had no opportunity to meet; and c) it accorded too much weight to the AG Opinion. (TURN/ORA Rhg. App., pp. 26-30.) Each of these arguments is discussed below.

1. "Cherry Picking" Public Utilities Code Sections to Reach a Preordained Outcome

TURN and ORA argue that the Decision errs by granting an exemption from Section 854 review, then conducting a public interest analysis under Section 854(c) and relying on the AG Opinion required under Section 854(b). TURN and ORA contend that no prior merger decisions apply the statutory provisions in this manner and thus the approach is inconsistent, arbitrary, and capricious. (TURN/ORA Rhg. App., pp. 26-27.)

TURN and ORA are incorrect in their evaluation of prior merger decisions. As already established in this Order, prior merger exemption decisions have used varying analytical approaches in evaluating public interest. We have similarly differed in whether they sought an AG Opinion.

Decision 05-11-029 followed the more conservative approach of the latter two Commission decisions by using the heightened public interest review as a guide despite granting the exemption. Such heightened review not inconsistent with prior decisions, and not arbitrary or capricious as TURN and ORA claim. Similarly, while we need not have sought an AG Opinion regarding competitive effects, we did so consistent with past merger exemption decisions in which we took the fullest opportunity to review the issues. Accordingly, there is no legal error.

2. Burden of Proof

TURN and ORA acknowledge that the Decision properly states that the Applicants bear the burden of proof to demonstrate that the proposed transaction is in the public interest. However, they contend the Decision in fact errs because it shifts that burden by requiring parties to overcome the conclusions reached by the AG Opinion regarding competition. TURN and ORA also assert that the Decision does not contain the required findings that Applicants have met their burden to show the transaction will not harm competition. (TURN/ORA Rhg. App., pp. 27-29.)

Specifically, TURN and ORA take issue with the discussion approach used in the Decision which begins with the sentence "[w]e find no reasonable basis upon which to reject the Attorney General's Advisory Opinion." (TURN/ORA Rhg. App., p. 27.) Focusing on the use of this sentence, TURN and ORA assert that the Decision attempts to shift the burden of proof. This argument is without merit.

The Decision conducts an issue by issue assessment of considerations necessary to evaluate whether the transaction presents antitrust/competitive concerns in each relevant market. In introducing each market assessment area, we summarized the conclusions reached by the AG Opinion, and then summarized the positions of the applicants and other parties. Finally, we continued with a full discussion section. (D.05-11-029, pp. 45-79.) TURN and ORA ignore the fact that the format approach used by the Decision is merely to state the conclusion at the outset for clarity. Following each such statement the Decision explains why we came to our conclusions when comparing the positions of the parties in relation to the advice of the Attorney General.

Further, contrary to TURN and ORA's claim, the Decision contains numerous findings and conclusions to support its determination that the proposed transaction will not adversely effect competition. (D.05-11-029, pp. 120-125 Findings of Fact 18-23.], pp. 127-128 [Conclusions of Law 7-17.].)

TURN and ORA do not specify what individual conclusions are believed to be in error or why. Instead they broadly claim that the preponderance of evidence suggests that absent mitigating conditions, the merger will harm competition in virtually every California intrastate market. (TURN/ORA Rhg. App., p. 28.) However, that TURN and ORA disagree with our conclusions does not establish that we failed to consider the evidence. The conclusions reached by both the Decision and the AG Opinion were based on a review of the record evidence and positions of the parties. In addition, we agreed that merger conditions were necessary in order to approve the transaction. Accordingly, the Decision notes that Verizon agreed to merger conditions imposed by the FCC as part of its approval of the transaction (D.05-11-029, pp. 28, 116-117.), and the Decision imposes additional merger conditions as part of this Commission's approval. (D.05-11-029, pp. 2-3.) Because TURN and ORA have failed to establish that the Decision improperly shifted the burden of proof, there is no legal error.

3. Weight Given to the AG Opinion

TURN and ORA contend the Decision errs because it accords the AG Opinion too much weight in rendering its findings regarding the competitive affects of the merger. (TURN/ORA Rhg. App., pp. 29-30.)

It should be noted that we are not legally bound to reject a proposed merger even where the action may in fact violate anti-trust law,[18] nor is the Commission required to seek the opinion of the Attorney General in exemption cases.

That said, in this proceeding, we sought the opinion of the Attorney General, which concluded that with Commission scrutiny of post-merger transactions, the merger will not have any adverse competitive effects. (AG Opinion, p. 25.) As

[18] See *Merger of AT&T/MediaOne* [D.00-05-023], *supra*, p. 25 (slip op.); and *Merger of WorldCom/MCI* [D.98-08-068], *supra*, pp. 719-720.).

previously discussed in Section I b) ii) of this Order, it is reasonable for the Decision to rely on the AG Opinion with respect to the competitive effects of the merger because the Legislature specifically charged the Attorney General with responsibility for evaluating the issue for use by the Commission. While TURN and ORA correctly state that there is no requirement that the Commission adopt the conclusions of the AG Opinion, it is also true that the law establishes that the Attorney General's opinion and advice is entitled to great weight.

It was reasonable to accord great weight to the AG Opinion in this case because its conclusions are based on numerous meetings with the parties, materials requested pertaining to those meetings, and evidence submitted in these proceedings as well as the parallel FCC proceedings. In addition, the AG Opinion sought additional information from other members of the industry and government agencies, as well as an economics consultant. (AG Opinion, p. 3.) Our Decision reflects that the AG's reasoning and conclusions were weighed against the information and positions presented by the parties. There is no basis to conclude that we simply deferred to the AG's conclusions without independent consideration.

TURN and ORA argue that the Decision errs because it refuses to consider the Herfindahl-Hirshman Index ("HHI") as required by the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines ("*Merger Guidelines*"). (TURN/ORA Rhg. App., pp. 29-30.) However, this is not an accurate representation of the consideration given to the HHI in either the AG Opinion or the Decision.

The AG Opinion states that in analyzing the competitive effects of the merger it employed the approach embodied in the antitrust laws, including the *Merger Guidelines* and the April 8, 1997 revisions of the *Merger Guidelines* relevant for determining the effects on the relevant markets. (AG Opinion, p. 7.) The AG Opinion specifically acknowledges that the *Merger Guidelines* require that the HHI be calculated as the analytic "starting point" in all merger reviews. However, it goes on to explain that the HHI, while useful in assessing mergers in dominant-firm industries, is not useful in this instance because Verizon and MCI have only a nominal share in the relevant markets for consideration. The AG Opinion states that the HHI is less useful in predicting effects in regulated or highly dynamic industries or in mergers between firms supplying differentiated products. In reasoning that the HHI is not a useful indicator here, the AG Opinion reasons in part that Verizon has a relatively minor presence in the relevant markets for both mass-market (facilities-based) long distance and enterprise services. MCI does not dominate either of these highly competitive industries, and entry barriers are minor. Similarly, MCI has a nominal share in these relevant markets and its absence will have inconsequential effects on price and output levels. Further, the AG Opinion states that the merger will not adversely affect competition for the DS1 and DS3 special access services supplied to enterprise customers. (AG Opinion, pp. 10-11.)

The Decision similarly considered use of the HHI analysis and provided specific reasons why it felt that the HHI did not provide a useful assessment of market effects in this case. In addition to the reasons articulated by the AG Opinion, we noted that the AG Opinion determined that the relevant local market is that of facilities-based service providers to mass market customers. However, no HHI increase for that market will occur because MCI does not provide facilities-based services in local markets and does not plan to offer such service in the future. Further, the Decision notes that TURN's calculation of dramatic increases in the HHI arise from its definition of the local market to include "resold" or "UNE-P" services. However, because of recent FCC decisions phasing out pricing at UNE-P levels, it no longer makes sense to include UNE-P resold service in the analysis of market shares. (D.05-11-029, pp. 53-55.) Both TURN and ORA have acknowledged the demise of the UNE-P business.[19]

The AG Opinion and the Decision consider the HHI, but provide specific reasons why it is not a useful predictor of market effects in this instance. TURN and ORA offer no legal basis to support an argument that the HHI must be used when it is considered, but determined not to be an accurate indicator of the competitive effects of

[19] See TURN Opening Brief, p. 45 and ORA Opening Brief, p. 25.

the merger in question. Further, no legal basis is asserted to require the Commission to reweigh the record on this issue.

Finally, TURN and ORA argue that the AG Opinion ignores evidence they presented in their respective testimony. (TURN/ORA Rhg. App., p. 29.) This argument is without merit. TURN and ORA offer no basis to contradict the Attorney General's representation that it did review the evidence presented in the record of this proceeding (AG Opinion, p. 3.), and it is merely a criticism of the AG Opinion which does not establish legal error in the Decision. Moreover, TURN and ORA fail to identify what testimony they believe was ignored. Instead they state only that the AG Opinion did not cite to their testimony a sufficient number of times. (TURN/ORA Rhg. App., p. 29. fn. 56.) TURN and ORA offer no legal authority which requires any requisite number of citations, the absence of which constitutes legal error. Because TURN and ORA failed to establish that the Commission improperly relied upon the AG Opinion, there is no legal error.

C. ALLEGED SECTIONS 1705 AND 1757 ERRORS

TURN and ORA allege that the Decision makes numerous errors under sections 1705 and 1757 of the Public Utilities Code, because: a) the Decision's reliance on the AG Opinion's market definitions is flawed and not supported by the record; b) the Decision's reliance on the AG Opinion's focus only on facilities-based competition in local markets is flawed and not supported by the record; c) the Decision's reliance on the Applicants' data to support the finding that its local wireline market share is eroding is flawed and not supported by the record; d) the Decision's refusal to consider HHI Calculations as part of the analysis to assess competitive impacts of the merger is flawed and not supported by the record; e) the Decision's approach to "sharing" benefits with consumers under section 853(b) is flawed and not supported by the record; and f) the Decision's failure to assess whether the merger would provide short-term economic benefits is flawed and not supported by the record and is inconsistent with the Decision's finding that the merger is in the public interest. Each of these contentions is discussed below.

As a preliminary matter, it should be noted that many of TURN and ORA's arguments here stem from a misunderstanding of the requirements of Sections 1705 and 1757. Although the Commission is required by Section 1705 to include in its decision "separately stated[] findings of fact and conclusions of law…on all issues material to the order or decision," the Commission is "not required to make express legal and factual findings as to each and every issue or sub-issue raised by a party to a Commission proceeding."[20] Furthermore, we find that TURN and ORA cast their arguments in light of an incorrect reading of Section 1757. Section 1757(a)(4) states that "review by the court shall not extend further than to determine" whether "[t]he findings in the decision of the commission are not supported by substantial evidence in light of the whole record." We have interpreted this "substantial evidence" standard as follows:

> Conflicts of evidence are to be resolved in favor of the findings of the administrative agency, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. Moreover, if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed.[21]

The fact that our findings differ from those proffered by TURN and ORA does not mean that we refused to consider relevant evidence. As the Decision states: "Our rejection of TURN's argument stems not from a failure to review its evidence, but from a decision that finds the evidence weak and the analysis faulty." (D.05-11-029, p. 118.) The fact that TURN and ORA disagree with the conclusions in the Decision does

[20] See *In Re San Diego Gas & Elec. Co.* [D.03-08-072] (2000) 2000 Cal. PUC LEXIS 1136, pp. 20-21 (slip op.).

[21] *In re USP&C* [D.03-04-062] (2003) 2003 Cal. PUC LEXIS 258, p. 14 (slip op.). See also, *TURN v. PUC* (1978) 22 Cal.3d 529, 538 ("findings are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence."); *City of Los Angeles v. PUC* (1972) 7 Cal. 3d 331, 351 ("When conflicting evidence is presented from which conflicting inferences can be drawn, the commission's findings are final.")

not demonstrate legal error, and we find no reason to reweigh the evidence in response to TURN and ORA's allegations.

1. Market Definitions

TURN and ORA first contend that the Decision adopts market definitions in the AG's Opinion, which allegedly have little or no support in the record, while ignoring the market definitions proposed by TURN and ORA. (TURN/ORA Rhg. App., pp. 30-33.) TURN and ORA give two examples of what they consider inappropriate market definitions. First, TURN and ORA take issue with the Decision's definition of "mass market" that includes residential and small business customers as falling into the same market. According to TURN and ORA, the Decision ignores evidence provided by TURN and ORA that small businesses and residential customers fall into separate submarkets, based on the criterion described in the AG's report: the ability for carriers to raise prices to one group of customers without those customers switching to another product at a lower price. TURN and ORA contend that lumping residential and small business customers into a single "mass market" runs afoul of the "smallest market" principle embodied in the *Merger Guidelines*.

Second, TURN and ORA fault the Commission for treating services to all business and governmental customers (other than the smallest "mass market" business customers) as falling into a single market –the "enterprise" market. According to TURN/ORA, our observation that this market is highly competitive with a large number and range of market participants ignores substantial record evidence that Verizon and MCI currently compete head-to-head for enterprise customers and both have significant shares of this market. TURN and ORA also fault the Decision for relying on non-California specific data in analyzing the competitive impact of the merger on this market.

We find that TURN and ORA's arguments are without merit for several reasons. First, as discussed above, there is no error by the Commission in giving great weight to the AG's Opinion. With regard to market definitions, we found that the AG's market definitions are reasonable and "follow[] standard antitrust analysis." (D.05-11-029, p. 47.) The AG's Opinion itself contains findings and conclusions that are based on the testimony and evidentiary record in this case and the AG's special expertise in evaluating competitive impacts. (AG Opinion, p. 3.) The AG's Opinion noted that the FCC, following the *Merger Guidelines*, determines a relevant product market by considering whether, if all carriers raised the price of a particular service or group of services, customers would be able to switch to a substitute service offered at a lower price. (AG Opinion, p. 9.) The AG's Opinion further states that defining relevant products by "rigid adherence to this process would, however, include 'each point to point calling route' [citation omitted] in the case of local and long distance services and every building or fiber lateral in the case of special access services." (*Id*., citation omitted.) Therefore, the AG Opinion notes, the FCC aggregates all customers within a hypothetical product market facing the same competitive alternatives and recognizes two customer groups with similar demand patterns: the "mass market" (residential and small businesses) and the "enterprise market" (large businesses and government users). The AG Opinion, and our Decision, therefore do not "ignore" TURN and ORA's evidence concerning market definitions or fail to provide an explanation for their approach to market definitions. Instead, they find that "strict adherence" to the *Merger Guidelines* produces markets that are far too narrow to provide useful predictions about the behavior of buyers and sellers in those markets. (*Id*.)

Second, the AG's market definitions are based on testimony and pleadings filed in these proceedings, the services currently supplied by both the Applicants, as well as the *Merger Guidelines* and FCC precedent. (*Id*., pp. 3, 7-9.) Furthermore, there is evidence in the record that supports the conclusion that MCI treats as mass market customers all consumers and businesses with fewer than 100 employees. (Hallback Rebuttal Test., pp. 16-17.) TURN and ORA's disagreement with these market definitions does not establish that the Decision's findings are not supported by substantial evidence.

In addition, many of TURN and ORA's contentions ignore some of the main findings in the Decision concerning the effect of the transaction on mass market competition –that MCI has elected to exit the local market, and thus no longer provides price constraining competition to Verizon. (D.05-11-029, p. 53; Findings of Fact 21-24.)

In light of this finding, many of TURN and ORA's arguments concerning mass market competition are immaterial to the Decision and do not require separately stated findings of fact under Sections 1705 and 1757. TURN and ORA seem to argue that this determination would be different if for example, we defined "mass market" with separate submarkets. However, TURN and ORA's market definition provides a distinction without a difference. Whether the mass market includes both residential and small business customers, or is divided up into separate subcategories as TURN/ORA suggest, does not undermine our central finding that MCI's business in serving all such customers is in irreversible decline. MCI's future competitive significance is the same for each of these categories of customers. TURN and ORA provide no argument to the contrary, and we find that their argument for separate and distinct markets for residential and small business services provides no grounds for rehearing.

TURN and ORA's contention that our Decision's market definitions conflict with the *Merger Guidelines* also does not provide grounds for rehearing. In making this argument, TURN and ORA are essentially asking us to reweigh evidence concerning the differences in demand characteristics between various categories of residential and small business services. There is no legal requirement that we do so. Moreover, the *Merger Guidelines* are a "framework" for "determining whether a merger is likely substantially to lessen competition." (*Merger Guidelines* Section 0.1.) There is no legal requirement that we perform our analysis lock-step with the *Merger Guidelines*, and TURN and ORA cite no authority supporting the contention that failure to follow the precise steps in the *Merger Guidelines* constitutes reversible legal error.

In addition, the FCC has rejected the argument that small business customers must be analyzed separately from residential customers.[22] In evaluating the competitive effects of the Verizon/MCI merger, the FCC's analysis used market

[22] The FCC has defined mass market customers as residential and small business customers that purchase standardized offerings of communications services. See e.g. *WorldCom/MCI* Order, 13 FCC Rcd at 18040, para. 24; *SBC/Ameritech Order*, 14 FCC Rcd at 14746, para. 68.

definitions similar to those used in our Decision, and included residential and small businesses in its definition of "mass market":

> The Commission has previously found that residential and very small businesses have similar patterns of demand, are served primarily through mass marketing techniques, purchase similar volumes and communications services, and would likely face the same competitive alternatives within a geographic market. Thus, we conclude that an analysis of market share of residential customers is likely to accurately represent Verizon's position in the mass market.[23]

TURN and ORA argue that the FCC's analysis for this market segment relies exclusively on data for residential customers and identifies separate product markets for local services, stand-alone long-distance services and bundled services. Although the FCC's analysis is based on residential customers in the Verizon/MCI case, the FCC also pointed to earlier cases where it treated residential and small business customers as part of the same mass market. (*Id*. citing *In the Applications of NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries* ("*Bell Atlantic/NYNEX Order*") (1997) 12 FCC Rcd 19985, 20016, para. 53 (discussing similarities between residential and small business customers); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (1999) 15 FCC Rcd 3696, 3829, para. 293 (discussing similarities between residential and small business customers in the context of unbundling rules); *In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines* ("*SBC/Ameritech Order*") (1999) 14 FCC Rcd 14712, 14746, para. 68 (including residential and small business customers in the same market).) Even including separate product markets in its analysis, the FCC reached the

[23] See *Verizon/MCI Merger Order*, para. 103, n. 306.

same conclusion as the Commission and the Attorney General: that the merger will not adversely affect competition in the mass market. And although it may be possible to identify additional and narrower relevant product markets, we found that the evidence in this record appropriately supports the market definitions and delineations used here. TURN and ORA are essentially asking us to reweigh evidence proffered to support their narrower market definitions.

Finally, we find that TURN and ORA's arguments regarding the definition for "enterprise market" are similarly without merit. Our findings with regard to the enterprise market are supported by substantial evidence. The Decision relied on evidence submitted by Verizon and MCI that there is a broad array of competitive providers for enterprise services. (D.05-11-029, p. 66, n. 155 (citing Rubinfeld Decl.).) Again, we did not "ignore" ORA's arguments that Verizon and MCI compete "head-to-head" for enterprise customers, but rather found that although Verizon and MCI operate in the same enterprise market, they focus on different sectors of this market. (D.05-11-029, pp. 65 (citing to Joint Applicants Opening Brief, p. 30; Rubinfeld Decl.), 67.) In addition to the AG's Opinion, there is evidence in the record supporting our conclusion that enterprise customers have multiple locations, nationally and internationally, and are served by competitors who compete nationally and internationally, so as to make it appropriate to examine the state of competition on a broader geographic scale. (*See* Hallback Decl. ¶¶ 48-57; Rubinfeld Decl. ¶¶ 124-126; 131-150.) The fact that we did not find TURN and ORA's arguments or evidence persuasive does not constitute legal error.

2. Facilities Based Competition in Local Markets

TURN and ORA next contend that the Decision errs by relying on the AG's Opinion which focuses only on facilities-based competition in local markets. (TURN/ORA Rhg. App., pp. 33-36.) The Decision states that the AG's "focus on facilities-based competition in local markets [is] appropriate and consistent with the approaches commonly used to review transactions such as this." (D.05-11-029, p. 53.) According to TURN and ORA, the AG's Opinion cites only one authority relying on this approach, the FCC's 1998 decision concerning the WorldCom/MCI merger.[24] TURN and ORA argue that this FCC decision, which concerns two NDIECs, does not provide a relevant guideline for analysis of the effect on competition in the local exchange market between a dominant provider and its major existing rival. TURN and ORA further argue that the approach focusing on facilities-based competition only conflicts with the Merger Guidelines and later FCC decisions which include a broader range of competitors, such as resold and UNE-P lines, than the AG considered. TURN and ORA further argue that because of the focus on facilities-based competition, the Decision fails to consider the effect of Verizon's acquisition of MCI's current retail customer base on the future of mass-market competition in California.

TURN and ORA further assert that we incorrectly concluded that "since MCI provides no facilities-based services in local mass markets (and therefore zero market share), and has no plans to offer service to local mass market customers… then the acquisition of MCI will produce no increase in the HHI for this market." (TURN/ORA Rhg. App., p. 36, citing D.05-11-029, pp. 53-54.) According to TURN and ORA, the record contains specific, facilities-based-only analysis using E911 data of the concentration that will result from the proposed mergers.

We find that TURN and ORA's arguments provide no basis for granting rehearing. Our decision to follow the analytical framework set out in the *WorldCom/MCI* case is well reasoned and supported by substantial evidence. The AG's Opinion noted that in the WorldCom/MCI merger, the FCC assessed competition in the relevant market for transmission capacity because "once a firm has overcome the barrier of deploying a national fiber network, all the other capabilities necessary to provide wholesale services are readily available." (AG Opinion, p. 11, citing *WorldCom/MCI Order* para. 28.) The AG concluded that resellers did not affect the analysis because, in the absence of any

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[24] See *In re Application of WorldCom, Inc. and MCI Communs. Corp. for Transfer of Control of MCI Communs. Corp. to WorldCom, Inc* ("*Worldcom/MCI*") (1998) Memorandum Opinion and Order, 13 FCC Rcd. 18,025.

barriers to entry into the resale market, resellers do not affect industry output, which is instead determined by the availability of facilities needed to serve the market. (*Id*., pp. 11-12.) The AG found that the same principle applied in the instant case because MCI is a reseller and does not offer facilities-based local mass market services, and there are many CLECs which offer that "readily available" service. (*Id*., citing Hallbach Decl. at ¶¶ 16, 41.) The AG also found that cable companies and other facilities-based suppliers do provide competitively priced VoIP service within Verizon's service territory in California. (*Id*., p. 12, citing Rubinfeld Decl. ¶¶ 42-43.) Accordingly, the AG included these facilities-based UNE-L and cable suppliers, but not resellers at the competitive retail level. The AG further noted that MCI will no longer be a price leader for the residential mass market services because of technological and regulatory changes in the mass market industry. (AG Opinion, pp. 12-13, citing Hallbach Decl. ¶¶ 27, 28-31.)

TURN and ORA ignore these principles and instead focus on a case involving an incumbent LEC where the FCC included resellers in its analysis. (See *In re Application of Ameritech Corp., and SBC Communications Inc., for Consent to Transfer Control* ("*SBC/Ameritech Order*") (rel. Oct. 8, 1999) Memorandum Opinion and Order, FCC 99-2791, CC Docket No. 98-141. However, in that case, the FCC's analysis relied in part on the notion that Ameritech might have moved from resale to facilities-based entry. (*Id*., ¶ 81.) Here, we rejected arguments that MCI may return to the local market as "speculation." (D.05-11-029, p. 53.) Moreover, TURN and ORA provide no legal authority which precludes us from using the analytical framework set out in *WorldCom/MCI*. As we explained in our Decision, TURN and ORA's argument stems from a fundamental disagreement over the regulatory environment and role of UNE-P in the local market. We noted that the AG's Opinion clearly links its restriction of the market to "facilities-based local services" to traditional competitive analysis that looks at whether a merged entity can manipulate the supply of the service. We further noted that the FCC's competition policy supports a facilities-based approach to competition, for it has recently eliminated UNE-P as a competitive entry mechanism and will phase out all pricing at UNE-P levels. (*Id*., p 54.)

As discussed, TURN and ORA's claim that the AG's Opinion conflicts with the *Merger Guidelines* also represents a fundamental disagreement in approaches to evaluating competition in this market. Consistent with the *Merger Guidelines,* the AG's Opinion rejects undue reliance on HHIs and market share, noting that while HHIs are an analytical "starting point" in all merger reviews, the relevance of the calculation is highly dependent upon the structure of the industry, how rapidly it is changing, and the theory of competitive effects. The AG noted that HHI is less useful in predicting effects in regulated or highly dynamic industries or in mergers between firms supplying differentiated products. (AG Opinion, p. 11-12.) Accordingly, the AG focused on barriers to entry. (*Id*., p. 12-13, 15.) The *Merger Guidelines* clearly support this approach in emphasizing that entry barriers are critical to a merger analysis. (See *Merger Guidelines* § 3.0.)

Ultimately, TURN and ORA's arguments are aimed at our conclusion that the transaction will not adversely affect mass market competition. However, there is substantial evidence in the record to support our findings that MCI's mass market business is in an irreversible decline and that MCI would have been in no position to put pricing pressures on Verizon California's services. (See Hallbach Decl. ¶¶ 18-47; Hallbach Rebuttal Test., pp. 7-12.) TURN and ORA both agreed that virtually all competition related to UNE-P services will no longer be viable in the near future. (TURN Opening Brief, p. 45; ORA Opening Brief, p. 25.) TURN and ORA's response to our findings regarding the meaningfulness of MCI's UNE-P based local mass market service is that "some other company might have acquired MCI and retained its retail customer base." (TURN/ORA Rhg. App., p. 35-36.) Such speculation, however, does not demonstrate legal error in our Decision.

We find that TURN and ORA's claims regarding HHI calculations ignore our specific discussion of their position on HHI in the Decision. Both the AG and the Commission concluded that HHI analysis would not be necessary or informative in this case, as it does not provide relevant insight into the dynamics of this market. (AG Opinion, p. 11; D.05-11-029, pp. 53-54.) We found that TURN's HHI analysis depended on its definition of the market, and found that the AG's Opinion was more consistent with standard economic analysis and more appropriate for the analysis of this market. (D.05-11-029, p. 118.) Although TURN argued that its evidence "suggests" a higher HHI concentration even when using the market definitions used by the Attorney General (TURN Opening Brief, p. 63.), we found TURN's HHI "evidence weak and the analysis faulty." (D.05-11-029, p. 118.) TURN and ORA's argument does not detract from our conclusion that HHI calculations are not useful or informative in this case, nor does it undermine our main conclusion that the transaction will not adversely affect competition in the mass market.

3. Local Wireline Market Share Eroding

TURN and ORA next contend that that the Decision's finding that Verizon's local wireline market share is eroding is flawed and not supported by the record. (TURN/ORA Rhg. App., pp. 37-39.) TURN and ORA argue that they "conclusively" demonstrated that Applicants' claim concerning wireline service losses are misleading, but that the Decision adopted this finding with no resolution of TURN and ORA's contrary evidence, in violation of Sections 1705 and 1757. In support of this argument, TURN and ORA point to evidence that Verizon's reported loss of switched business lines are actually replaced with a gain in non-switched lines, and that its reported loss of secondary lines is replaced with its own increase in DSL service. (TURN/ORA Rhg. App., pp. 37-38.)

TURN and ORA further argue that when a customer in Verizon-CA's footprint uses a non-Verizon wireless service for local or long-distance calls, there is an "excellent chance" that some part of the call actually will be carried on the Verizon network, generating revenues for Verizon. According to TURN and ORA, this evidence demonstrates that the number of connections to end user customers that Verizon actually controls has steadily grown, not declined. TURN and ORA also contend that various forms of intermodal competition, such as VoIP, should have been excluded from the relevant product market since Applicants are VoIP competitors and the sources of intermodal competition are also more new sources of income for Applicants as a whole.

(TURN/ORA Rhg. App., pp. 38-39.) According to TURN and ORA, the Decision relies upon speculation as to the potential penetration of intermodal services as evidence that their existence and functional substitutability for Verizon wireline local services will be sufficient to constrain Verizon-CA prices or force Verizon-CA to flow-through economic benefits of the merger to California ratepayers.

We find that TURN and ORA merely reargue evidence and restate arguments already heard and rejected by us. As discussed above, Sections 1705 and 1757 do not require the Commission to "resolve" contrary evidence. Substantial evidence supports our conclusion that intermodal alternatives compete with wireline services. (See Hallbach Decl. pp. 34-41; Rubinfeld Decl. para. 24-25; Hallbach Rebuttal Test., pp. 11-12; Rubinfeld Rebuttal Test., para. 20-25, 33-38.) The fact that we found this evidence concerning intermodal alternatives convincing, rather than TURN and ORA's evidence, does not render our Decision "speculative." And although TURN and ORA point to the fact that Verizon is also a VoIP competitor, and thus earns additional revenues from its own intermodal services, they fail to demonstrate how this factor justifies rehearing. The fact that Verizon earns additional revenues (in a competitive market) does not diminish the relevancy of our conclusion that "if MCI is providing no telecommunications services in a market except through the resale of a Verizon service that the FCC is in the process of eliminating, then consolidation with Verizon should not affect the supply of telecommunications service to the market in any way." (D.05-11-029, pp. 54-55.)

4. HHI Calculations as Part of the Analysis to Assess Competitive Impacts of the Merger

TURN and ORA contend that the Decision fails to perform or consider any HHI analysis in its competitive analysis as required by the *Merger Guidelines*. According to TURN and ORA, given that the TURN/ORA HHI analyses were the only record evidence on the issue of concentration, the Decision violates Sections 1705 and 1757 by failing to consider this evidence. TURN and ORA argue that, at a minimum, if the Decision dismissed this evidence, it should provide a "reasonable explanation that is more detailed than the flippant accusation that TURN's approach was 'misguided.'" (TURN/ORA Rhg. App., p. 41.)

TURN and ORA raise similar arguments with regard to the weight the we gave to the AG Opinion, as discussed in Section II(c) of this memo. As stated, our Decision, as well as the AG Opinion, explains why we found that an HHI analysis would not provide relevant insight into the dynamics of the local mass market and why it was not needed to perform a competitive analysis. Indeed, as the Decision explains "since the Advisory Opinion finds that the relevant local market is that of facilities-based service providers to mass market customers, and since MCI provides no facilities-based services in local mass markets (and therefore zero market share), and has no plans to offer service to local mass market customers, facilities-based or otherwise, in the future, then the acquisition of MCI will produce no increase in the HHI for this market." (D.05-11-029, pp. 53-54.) Although TURN and ORA argue that they have already shown the errors of focusing only on a facilities-based competition analysis, we find these arguments are without merit, for the reasons discussed above.

5. Sharing of Benefits Under Section 853(b)

TURN and ORA assert that the Decision errs because it imposed merger conditions without considering the conditions and benefits sharing they proposed in the proceeding. In addition, TURN and ORA state the Decision does not explain its own conclusion regarding potential benefits. Accordingly, TURN and ORA contend the Decision violates Section 1705. (TURN/ORA Rhg. App, pp. 41-42.)

As previously discussed, the Decision lawfully grants an exemption from Section 854 review. As a result, the Decision is not required to conduct they type of short-term and long-term benefits assessment TURN and ORA seek under Section 854(b). As the Decision notes, granting of a Section 853(b) exemption requires only that the Commission determine that the transaction is in the public interest, not that we conduct a dollar-by-dollar assessment and enumeration of benefits under Section 854. (D.05-11-029, p. 118.) Nevertheless, using Section 854(c)(6) as a guide, we did assess whether the transaction will be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility. (D.05-11-029, pp. 96-103, 120 [Finding of Fact 14], 125-126 [Finding of Fact 59].)

TURN and ORA are incorrect that the Decision ignores the merger conditions they recommended in the proceeding. Our Decision acknowledges that numerous conditions were proposed by the parties and, while not reiterating each and every one, cites to the record where the relevant and often lengthy enumeration of conditions can be found. (D.05-11-029, pp. 106-114.) TURN and ORA suggest that we should discuss why each proposal was not meritorious. (TURN/ORA Rhg. App., p. 41.) However, as indicated by the Decision, there were pages and pages of conditions proposed by the various parties. We acknowledged consideration of these proposals, and specifically discussed some of those determined to be most noteworthy. (D.05-11-029, pp. 96-103, 45-79.)

Further, apart from reasserting that we should impose a five-year rate freeze, TURN and ORA do not specify what conditions they ask to be imposed, nor do they present any legal basis to conclude the determination not to impose various recommended conditions constitutes legal error.

Contrary to TURN and ORA's claim, our Decision does explain our conclusions as to why benefits will flow to customers. As mentioned above, this discussion involved a broad analysis of benefits under Section 854(c)(6) and also took into account the already imposed FCC merger conditions and imposed its own additional conditions. (D.05-11-029, pp. 2-3.)[25] The Decision explains in part, our reasoning of how merger benefits will be realized via economic benefits to Californians which will be received through the Greenlining Agreement. (D.05-11-029, pp. 96-103.) In addition, market forces under the current regulatory structure and Verizon's acceptance of merger-related conditions will help ensure benefits are realized by California customers. (D.05-11-029, pp. 27-28.) The Decision states:

[25] Also see D.05-11-029, pp. 115-116, where we discuss any future need to conform its DSL condition with the final FCC order.

> This transaction will likely produce significant cost savings and other synergies for the combined firm. These transaction-related benefits will be passed through to customers through competition and market forces. (D.05-11-029, p. 120 [Finding of Fact 14.].)
>
> The transaction will be beneficial on an overall basis to state and local economies, and the communities in the areas served by the resulting public utility. Specifically, the merger will produce cost savings and other synergies that will be passed through to California customers through competition and market forces. The transaction will also result in the combined company's ability to offer a broader range of services, and more advanced services, to California consumers. The transaction will promote competition in communications in California, resulting in an improved quality of service, more competitive prices, and greater technological innovation that will inure to the benefit of customers. (D.05-11-029, pp. 125-126 [Finding of Fact 59.].)

TURN and ORA disagree with the findings and contend we should have discussed certain exhibits they presented to show there is a risk market forces will not result in benefits flowing to ratepayers.[26] (TURN/ORA Rhg. App., p. 42.) However, that we reached a different conclusion without specifically identifying the cited exhibits is not tantamount to legal error. The record reflects that there was substantial evidence upon which the Decision based its conclusions,[27] and we did explain our conclusions regarding potential benefits and make the requisite findings. TURN and ORA offer no legal authority which requires the Commission to reweigh the evidence on this issue. Therefore, the Decision does not violate Section 1705.

[26] TURN and ORA cite to TURN Reply Testimony (Murray/Kientzel); TURN Opening Brief; ORA Reply Testimony (Selwyn).

[27] See Joint Applicants Opening Brief, pp. 45-55 and the referenced supporting testimony and exhibits.

6. Short – Term Economic Benefits

TURN and ORA argue that the Decision errs because it fails to analyze whether the merger will provide short-term economic benefits pursuant to Section 854(b) and thus, violates Section 1705. (TURN/ORA Rhg. App., pp. 42-46.) This argument is essentially identical to the argument raised and addressed in above Sections II b) iii) and III e) of this Order. For the reasons stated in those Sections, there is no legal error.

In addition, however, here TURN and ORA expand on their prior arguments by resubmitting the recommendation that the Commission impose as a merger condition a five-year rate freeze, and restating disagreement with the conclusions reached by the AG Opinion and the Decision with respect to intermodal competition and potential market concentration. There is no legal basis to require a reweighing of this evidence. Therefore, there is no legal error.

D. Alleged Procedural Defects

TURN and ORA make a number of arguments concerning the procedural schedule, the need for evidentiary hearings, and the reasons given for not holding evidentiary hearings, which TURN and ORA contend amounts to a denial of due process in this proceeding. Each of these arguments is addressed below.

1. Procedural Schedule and Denial of Due Process

TURN and ORA first claim that there was a pattern of rulings on procedural issues by the Presiding Officer in this case which resulted in a denial of due process. (TURN/ORA Rhg. App., pp. 48-52.) TURN and ORA argue that this pattern culminated with the September 19, 2005 Assigned Commissioner Ruling (ACR) that found Section 854 (b) and(c) inapplicable and concluded that there was no need for evidentiary hearings. According to TURN and ORA, the pattern of rulings suggests a "results-oriented" process to conclude the Commission's review of the merger by the end of 2005. (TURN/ORA Rhg. App., pp. 48-49.) TURN and ORA refer to their Motion for Modification of the Procedural Schedule filed on September 6, 2005, which outlines details about "timing, the steps that litigants must go through to develop a case that contributes to Commission decision-making, and the realistic expectations that the Commission should have of the parties in this case that generally participate in multiple telecommunications proceedings before the Commission concurrently." (TURN/ORA Rhg. App., p. 50.) In particular, TURN and ORA point to the time given to review and challenge Applicants' Rebuttal Testimony. TURN and ORA contend that although Verizon and MCI offered to rest on their initial Opening Testimony filing, they then submitted evidence in their Rebuttal Testimony that should have appeared in their direct case. TURN and ORA argue that the two weeks given to respond to the Rebuttal Testimony effectively foreclosed the opportunity to obtain substantive discovery responses.

We find that TURN and ORA's arguments can be distilled down to two points: 1) there was an unreasonable schedule which curtailed the opportunity to conduct discovery and prepare briefs, which in turn lead to a denial of a meaningful opportunity to be heard and offer evidence on factual matters that serve as a basis for the Commission's decision; and 2) there was a pattern of procedural rulings in this case, including the compressed schedule and lack of evidentiary hearings, which was indicative of a "results-oriented" Presiding Officer and bias in that the outcome of the case was a foregone conclusion.

As to the first point, TURN and ORA's claims do not demonstrate that the procedural schedule was arbitrary or capricious or a denial of due process. We have the authority to determine the type of "hearing" that will be used, subject to due process, public policy, and statutory requirements. (Pub. Util. Code, § 1701.1, subd. (a), which provides: "The [Commission] shall determine whether the matter requires a quasi-legislative, an adjudication, or a ratesetting hearing.") There are no due process requirements as to how long the proceeding must be; only statutory requirements that certain proceedings should not take longer than a designated period, e.g. resolution of adjudications within 12 months of initiation and ratesetting or quasi-legislative case within 18 months of the date of the issuance of the scoping memo. (Pub. Util. Code, §§ 1701.2, subd. (d) & 1701.5, subd. (a).)

In this case, the Applicants Verizon and MCI filed their Application and opening testimony on April 21, 2005. According to the June 30, 2005 Scoping Memo, the proceeding schedule was to culminate in a Commission decision on November 18, 2005, if hearings were not deemed necessary, or December 1, 2005, if hearings were held. Intervenors' reply testimony was to be served on August 1, 2005. On July 13, 2005, several Intervenors requested an extension to file reply testimony. Over the objections of the Applicants, that request was granted in part and Intervenors were given until August 15, 2005 to serve reply testimony. On September 6, 2005, Intervenors again sought modification to the procedural schedule, in order to have more time to analyze Applicants' rebuttal testimony and prepare motions on the need for hearings, for hearing preparation, and for opening briefing. That request was denied by the Assigned Commissioner on September 12, 2005.

Although some merger cases have taken longer, as noted in the Sept. 12, 2005, ACR, the schedule in this proceeding is not out of line with Commission precedent. (See *Comcast/AT&T* [D.02-11-025] 2002 Cal. PUC LEXIS 731 (6 months from filing to decision); *MCI/WorldCom* [D.98-08-068] 1998 Cal. PUC LEXIS 912 (9 months from filing to decision); *MCI/BT* [D.97-07-060] 1997 Cal. PUC LEXIS 557 (6 months from filing to decision).) The schedule in this case was less than 8 weeks shorter than the parallel SBC/AT&T merger.

Although TURN and ORA argue that the schedule prevented them from analyzing and obtaining substantive discovery responses on Applicants' rebuttal testimony, they fail to demonstrate what discovery requests to which Applicants failed to respond. TURN and ORA were able to propound numerous discovery requests concerning Applicants' rebuttal testimony and attached such discovery responses to their opening briefs. (*See* Attachments to TURN's Opening Brief.) Moreover, as noted in the September 12 ACR, TURN and ORA had recently completed hearings on similar arguments in the SBC/AT&T proceeding and should have been able to draw on that proceeding in preparing motions on the need for hearings as well as briefs. (Sept. 12, 2005, ACR, p. 6.)

Finally, as noted in the September 12 ACR,

> Perhaps the most dramatic evidence undercutting the argument of Protestants that they cannot participate in this proceeding and that the Commission cannot develop a substantial record in this proceeding is the scope and scale of the Protestants' own testimony. Even with what TURN and ORA characterize as a truncated schedule, they have already each filed several hundred pages of testimony that together dwarf that of any other party, including the Applicants. This extensive testimony belies their arguments that resource and schedule constraints prevent their participation, or that we cannot develop an extensive record. (*Id.*, p. 7.)

Of course, we recognize that the volume of testimony is not necessarily indicative of the substantive quality of that testimony. However, in reviewing TURN and ORA's testimony and briefs, it is apparent that they were able to present extensive evidence and argument on each of the material issues that they identified in their application for rehearing, including the impact and availability of intermodal competition, the extent of Verizon's wireline losses, an analysis of market concentration, proposed mitigation measures, and MCI's presence in the mass market. Accordingly, TURN and ORA's argument that the compressed schedule in this proceeding prevented them from adequately developing their case, and therefore deprived them of a meaningful opportunity to be heard, is unpersuasive.

As to TURN and ORA's second point concerning a "results-oriented" proceeding, TURN and ORA concede that "no single ruling by the Presiding Officer on a procedural issue can provide a basis for rehearing or remand of this case." (TURN/ORA Rhg. App., p. 46.) Rather, they assert that the cumulative effect of these rulings led to a denial of due process. However, TURN and ORA fail to articulate a legal standard for the due process right they assert was violated by a cumulative pattern of procedural rulings. As discussed above, there was no due process violation stemming from the procedural schedule set in this case.

As to TURN and ORA's argument that the rulings demonstrated bias by the Presiding Officer in orchestrating a results-oriented proceeding, TURN and ORA again fail to cite to any legal authority establishing a standard for a showing of bias. In fact, the standard is that there must be a "clear and convincing showing" that the Presiding Officer has an unalterably closed mind on matters critical to the disposition of the proceeding. "Bias and prejudice are not implied and must be clearly established. A party's unilateral perception of bias cannot alone serve as a basis for disqualification…. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice." (*State Water Resources Control Cases* (2006) 2006 Cal. App. LEXIS 171, * 369, citing *Gray v. City of Gustine* (1990) 224 Cal. App. 3d 621, 632.) TURN and ORA make no clear showing of bias in this case. TURN and ORA have not demonstrated that a "compressed" procedural schedule or the fact that the Applicants have sought to conclude the Commission's review of its merger by the end of 2005 (see TURN/ORA Rhg. App., p. 48) meet the required showing for bias and prejudgment. Nor have TURN and ORA demonstrated that bias can be inferred from adverse rulings issued in the course of a proceeding. Accordingly, we find no grounds for rehearing on this point.

2. Need for Additional Discovery and Evidentiary Hearings

TURN and ORA next contend that the matter must be remanded for additional discovery and evidentiary hearings. TURN and ORA argue that the lack of evidentiary hearings in this case amounted to a violation of due process, and the most "obvious evidence" of this violation is the fact that evidentiary hearings were held in the parallel SBC/AT&T merger proceeding. (TURN/ORA Rhg. App., pp. 52-53.) According to TURN and ORA, affording evidentiary hearings to SBC-AT&T while not doing so to Verizon-MCI is, on its face, arbitrary and capricious.

We disagree. As discussed in more detail below, there is no due process right to a hearing in a ratesetting case such as this. Absent any conflicting analysis with regard for the need to conduct evidentiary hearings (and TURN and ORA fail to point to any such conflict), the fact that we gave more process than was required in the SBC/AT&T proceeding does not mean that our decision not to hold hearings in the Verizon/MCI proceeding was arbitrary or capricious.

TURN and ORA further argue that the specific facts and circumstances of this case merit hearings. TURN and ORA point to *City of Los Angeles v. PUC* for the proposition that it is only when "[n]o facts are open to serious dispute, no witnesses' demeanor need be judged, no policy decisions on which public sentiment might prove useful are before the commission" that hearings serve no useful function. (*City of Los Angeles v. PUC* (1975) 15 Cal. 3d 680, 703.) TURN and ORA assert that there were several disputed material issues of fact that made hearings necessary in this case, and cite some examples of how some of the facts and circumstances of this particular case merit additional time for discovery and evidentiary hearings.

We find that TURN and ORA's reliance on *City of Los Angeles* is misplaced. In that case, the Court looked at whether the use of an annual adjustment formula in general rate tariffs exceeded constitutional bounds because it failed to provide the utilities with a prior hearing before each annual adjustment of rates occurred. In the above quote relied upon by TURN and ORA, the Court was referring to a "hearing" in the broadest possible sense –not an evidentiary hearing with the opportunity to cross examine witnesses. In fact, the Court stated that it "has long made it clear that within the regulatory context due process is a flexible concept, permitting expert administrative agencies broad latitude in adapting the specific regulatory needs of their jurisdictions." (*Id*. at 698.) The Court found that in that particular circumstance, although the Commission could permit written briefs from the parties, it was not constitutionally required. (*Id*. at 703.) Moreover, as explained in more detail below, the fact that there may be material issues of fact in dispute does not necessarily mean that evidentiary hearings are required. The Commission may properly resolve such conflicts without a hearing if there is a sufficient written record upon which the Commission may base its findings and conclusions.

Although they concede that there is no statute or Commission rule requiring an evidentiary hearing, TURN and ORA seem to argue that nonetheless their constitutional due process rights were violated. As we have previously noted:

Due process requires that parties be given notice and

> opportunity to be heard. There must be due notice and an opportunity to be heard, and the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon the evidence and not arbitrarily. (*Railroad Commission of California v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393.) Due process requires a meaningful opportunity to be heard. (*Alaska Roughnecks & Drillers Ass'n v. N.L.R.B.* (9th Cir. 1977) 555 F.2d 732, 735, citing *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.) However, this does not mean that something less that a full evidentiary hearing is not sufficient; rather the amount of process due depends on the particular situation. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 343.)[28]

In the case of ratemaking, there is no constitutional right by which an evidentiary hearing would be required. As noted by the California Supreme Court in *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292:

> Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially a legislative act. [Citation omitted]. As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a commission proceeding exists at all only as a statutory and not a constitutional right.

Thus, in the instant case, which is a ratemaking proceeding, there are no constitutional due process rights involved.

Since there are no constitutional due process rights involved, we have the discretion to determine whether a hearing is warranted based on the facts of the case. TURN and ORA must show that we somehow abused our discretion in determining, as we did, that the record was sufficient to reach a reasoned conclusion on all material

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[28] *In re Implications for Pacific Gas & Electric Co. Pursuant to the Commission's Alternative Plan of Reorganization under Chapter 11 of the Bankruptcy Code* [D.04-03-009] 2004 Cal. PUC LEXIS 72, **64-65.

issues, and that full-blown evidentiary hearings were not necessary. TURN and ORA attempt to do this by providing examples of specific areas of inquiry and related facts that are or should be in the record in order for Applicants to meet their burden of proof by preponderance of the evidence.

Although TURN and ORA give examples of additional information they might elicit from cross-examining Verizon's witnesses, a hearing is not required "merely to 'sharpen the issues' or 'fully develop the facts.'" (*Georgia-Pacific Corp. v. U.S. Environmental Protection Agency* (9th Cir. 1982) 671 F.2d 1235, 1241.) If the record is sufficient for the Commission to make a reasoned decision, a hearing is not warranted. In response to the examples raised by TURN and ORA, we find that hearings were not necessary to determine whether to apply a formal HHI analysis, and there was a sufficient record of written submissions (including the Attorney General's Opinion) upon which we could properly base its determination. Likewise, TURN and ORA's disputes over the current status of intermodal alternatives stem not so much from a disagreement over the facts themselves, but from a disagreement over the implications arising from those facts. And as discussed above, there was sufficient evidence in the record, even without regard to intermodal alternatives, concerning MCI's ability to restrain Verizon's pricing in the mass market for the Commission to conclude that the merger would not result in an incremental adverse effect on competition. As for the Greenlining Agreement, again TURN and ORA fail to identify material facts that would require a live hearing. As discussed in more detail below, the Greenlining Agreement "constitutes little more than a common position by certain parties and their experts that offers an appropriate way to address issues of specific concern to California communities, including those issues known as 'digital divide issues.'" (D.05-11-029, pp. 102-103.) The Agreement did not preclude TURN or ORA from being heard on the proposal's merits or from advocating their own proposals for broadband connectivity, philanthropy, or supplier diversity. Accordingly, we find that TURN and ORA's arguments do not establish legal error in the Decision.

3. The "Six Major Considerations" in Determining Not to Hold Evidentiary Hearings

Finally, TURN and ORA argue that our analysis in determining whether or not to hold hearings is generally flawed. We cited six factors in considering whether evidentiary hearings were necessary in this case:

1) No statute or Commission rule requires evidentiary hearings;
2) There is sufficient evidence in the record to permit the Commission to decide this matter;
3) The public has had ample opportunity to participate in this proceeding;
4) Since Section 854(b) does not apply to this transaction, many issues raised by parties become moot;
5) Many of the remaining issues identified conflate policy issues with issues of fact, and;
6) The Commission can and has frequently resolved issues of fact without evidentiary hearings.

While we address each of TURN and ORA's arguments below, overall we find no grounds to grant rehearing with regard to our determination not to hold hearings in this proceeding. Ultimately, we found that there was sufficient information available in this proceeding to assess whether the proposed merger is in the public interest. In addition, as the previous discussions in this decision demonstrate, there is sufficient evidence in the record supporting our determinations on each of the material issues raised by TURN and ORA.

TURN and ORA first fault our conclusion that no statute or Commission rule requires evidentiary hearings. Although TURN and ORA do not point out any legal error in the our conclusion, they argue that this analysis is besides the point –that in this case the proper analysis is whether the procedures in the instant case allowed Intervenors a sufficient opportunity to make their case, and whether the material issues of fact still in dispute were "amenable to resolution by resort to the written record." (TURN/ORA Rhg. App., p. 60.) While TURN and ORA are correct that no party alleged that a specific statute or Commission procedure guarantees them a right to an evidentiary hearing, they are incorrect that the discussion has no relevance whatever. In addition to discussing statutory or Commission rule bases for evidentiary hearing, the Decision also discusses whether due process rights mandate a hearing in this instance. The discussion is relevant and as explained above, we were correct in concluding that there is no due process right to an evidentiary hearing in this type of proceeding. Also as discussed, the Decision addresses the procedure in this case as well as whether the material issues of fact still in dispute could be resolved by resort to the written record.

TURN and ORA next claim that the second point, that “there is sufficient evidence in the record to allow the Commission to decide the matter,” is faulty because we recited the amount of information that has traded hands among the parties and the number of pages in submitted filings as factors for determining whether a full evidentiary record has been developed without hearings. Although TURN and ORA are correct that “the amount of evidence can [not] be a proxy for the sufficiency of the record” (TURN/ORA Rhg. App., p. 61.), the point we were making is that the record is extensive and sufficient to support the Decision’s conclusions and findings. As discussed above, the Decision made all of the findings required by California law, and those findings are based on substantial evidence in the record.

TURN and ORA next claim that the fact that public participation hearings (PPHs) were held is irrelevant to whether evidentiary hearings should be held. TURN and ORA argue that PPHs are a supplement to, not a substitute for, evidentiary hearings, and that this section should also be deleted from the Commission’s analysis in its entirety. Although TURN and ORA are correct that PPHs are not a substitute for evidentiary hearings, we did not cite the fact that PPHs were held for this proposition. Rather, we cite to the PPHs for the proposition that the proceeding has benefited from a review by the public of this proposed transaction. It is merely one factor among many that we considered in determining whether to hold evidentiary hearings, and there is no reason to delete this reference to the public’s review of the merger.

TURN and ORA next claim that there is error in our conclusion that many issues of material dispute raised by the parties are moot since Section 854(b) does not apply to this transaction. TURN and ORA argue that they have demonstrated that the public interest in this case warrants the specific allocation of benefits to ratepayers under Section 854(a). TURN and ORA further point out that they had previously argued that the Commission has the authority under Section 853(b) to mandate sharing of economic benefits of this merger. (TURN/ORA Rhg. App., p. 62.)

As previously discussed, the Decision lawfully grants an exemption from Section 854 review. As a result, we were not required to conduct they type of short-term and long-term benefits assessment TURN and ORA seek under Section 854(b). TURN and ORA seem to argue that because the Decision discusses "merger benefits" it was therefore wrong to conclude that many of the issues raised by the parties concerning allocation of benefits were moot. However, TURN and ORA confuse the requirement to mandate sharing of economic benefits of the merger under Section 853(b) with the more general finding under Section 854(c)(6) that the merger "[b]e beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility." Since there is no requirement to conduct a dollar-by-dollar assessment of benefits, we were correct in concluding that many of TURN and ORA's issues were moot.

TURN and ORA next argue that the Decision's assertion that "many of the remaining issues" raised by Intervenors "conflate issues of policy with issues of fact" is unsupported. TURN and ORA correctly point out that while the Decision states that many of the remaining issues conflate policy with issues of fact, the examples used in this part of the analysis are the same issues that were rendered moot by the Section 854(b) exemption. However, TURN and ORA do not attempt to demonstrate that the Commission was incorrect that the examples given conflate policy with fact. Rather, TURN and ORA contend that the Decision cavalierly dismisses *all* of the remaining issues as being conflations. This is not the case, as the Decision recognizes that there are remaining disputed factual issues, giving the examples of the competitive situation concerning special access circuits, as well as the need for regulation to ensure non-discriminatory treatment of packets moving across networks. (See D.05-11-029, p. 41.) Accordingly, TURN and ORA do not demonstrate legal error with the Decision.

As to the final factor, that the Commission has previously decided complex and contentious proceedings without holding evidentiary hearings, TURN and ORA argue that the cases relied upon by the Commission are inapposite, as they all involve combinations of companies that are certified as NDIECs or CLECs. TURN and ORA also point out that in some of the cases cited by the Commission, parties did not ask for or withdrew requests for hearings. While it is correct that none of the cases involve an ILEC and a major rival CLEC, TURN and ORA focus solely on the size, certification or gross annual revenues of the companies involved, and ignore the types of issues that were contested in those cases. For example, in the AT&T/Comcast merger [D.02-11-025], Qwest argued that hearings were necessary to determine whether the transaction was in the public interest, and argued, among other things, that the merger would adversely impact competition in cable telephony and harm consumers. Qwest also contended that hearings were necessary to determine whether the transaction would maintain or improve the utilities' financial condition. In the AT&T/Media One merger [D.00-05-023], GTE argued the need for hearings to demonstrate that the merger would severely harm competition. In the MCI/WorldCom merger [D.98-08-068], full evidentiary hearings were asked for to address several contested issues, including the contention that the merger would eliminate MCI as one of the largest major competitors, create a market dominated by one powerful provider, with the next largest provider (Sprint) having a 30.5% market share, and leave the market with only two significant market participants. Parties also argued that hearings were needed to examine whether the merger would eliminate the strongest potential competitor for facilities-based competition in this market. Accordingly, the point in relying on these cases is that these were merger cases which were controversial and subject to protest, yet we found that we could resolve disputes over material issues of fact by resorting to the written record without evidentiary hearings. The fact that an ILEC and a major competing rival CLEC was not involved does not amount to legal error.

Ultimately, the question of whether to hold evidentiary hearings depends not on whether there are material issues of fact in dispute, but on whether there is sufficient information in the record to enable the Commission to reach findings on all the issues that California statutes require the Commission to address. The structure of this decision, which addresses each provision of the guiding and controlling statutes, demonstrates that there is no need for hearings or further discovery. Although in our analysis, we did not specifically address each and every issue that TURN and ORA raise, we did find overall that there was sufficient information available in this proceeding to assess whether the proposed merger is in the public interest. In addition, as the above discussion demonstrates, there is sufficient evidence in the record supporting our determinations on each of the material issues raised by TURN and ORA. TURN and ORA's only rejoinder to this point is that the procedural schedule denied them the opportunity to put in evidence detracting from the decision. As discussed above, this claim is not persuasive. Therefore, we find no legal error in our determination that evidentiary hearings were not necessary, and that there was a sufficient written record to resolve address these issues.

E. Rule 51 and Greenlining Agreement

TURN and ORA contend that the Decision ignores the Commission's Rules of Practice and Procedure by failing to treat the "Greenlining Agreement" between Greenling and Latino Issues Forum ("GL/LIF") and Verizon as a "settlement" pursuant to Rule 51. According to TURN and ORA, the agreement between GL/LIF and Verizon was clearly called a "Settlement Agreement" by those parties, and was intended by those parties to be a "Settlement Agreement." Accordingly, TURN and ORA claim that Rule 51 procedures should have been followed, including notice, a settlement conference and opportunities for comments by all affected parties to any proposed settlement or stipulation. Rule 51.6 also provides for hearings when the provisions to a settlement are disputed. (TURN/ORA Rhg. App., pp. 68-69.)

According to TURN and ORA, the Commission merely asserted that the agreement is not a settlement because "we say it is not" and that "we have not given it the deference reserved for a Settlement." (TURN/ORA Rhg. App., p. 69.) However, TURN and ORA are committing the same fallacy that they argue we are committing: TURN and

ORA are insisting the document is a "Settlement Agreement" merely because it says it is, or merely because the parties called it a "Settlement Agreement."[29] TURN and ORA make no analysis whatsoever as to why the contents of the agreement constitute a "settlement" under Rule 51. We, however, did make such an analysis in rejecting TURN and ORA's arguments that the Greenlining Agreement constituted a "settlement" under Rule 51. We noted that Rule 51(c) defines a "settlement" as "an agreement…on a mutually accepted outcome to a Commission proceeding." We further found that an outcome to the proceeding would be a decision to approve or deny the application. (D.05-11-029, p. 102.)

Rather than constituting an agreement on the approval or denial of the merger, the Greenlining Agreement was an agreement between GL/LIF and Verizon and their experts that Verizon's participation in a broadband task force, targeting philanthropy, and contracting practices can address specific needs of California communities, and expressed GL/LIF's view "that evidentiary hearings need not be held in order for the Commission to address their concerns." (Greenlining Agreement § 3; see also Reply of Greenlining Institute Regarding Need for Evidentiary Hearings, p. 1.) As we correctly noted, the Greenlining Agreement did not constitute a settlement as to the outcome (i.e. the approval or denial of the application), but rather "constitutes little more than a common position by certain parties and their experts that offers an appropriate way to address issues of specific concern to California communities, including those issues known as 'digital divide issues.'" (D.05-11-029, pp. 102-103.) Nor did the Greenlining Agreement constitute a settlement with regard to an outcome on digital divide issues, as we added another condition to specifically address issues relating to the digital divide. Accordingly, we did not give the Agreement deference reserved for a settlement, as that term is used in Rule 51. Nor did the Agreement preclude TURN or ORA from being

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[29] We also note that both Verizon and GL/LIF filed oppositions to TURN/ORA's application for rehearing; neither agree with TURN/ORA's characterization of the Greenlining Agreement as a "settlement agreement" under Rule 51.

heard on the proposal's merits or from advocating their own proposals for broadband connectivity, philanthropy, or supplier diversity. Indeed, we discussed TURN and ORA's substantive objections to the Agreement in our decision. (*Id*., pp. 96, 102-103.)

In short, the Agreement did not serve to terminate the proceeding or affect any other party's right to continue to assert its positions before the Commission, as such it was proper to find that the Agreement was not a "settlement" within the meaning of Rule 51.

F. Condition to Provide Stand-Alone DSL

In its application for rehearing, Verizon challenges the condition that requires Verizon to offer digital subscriber line ("DSL") service to customers who do not subscribe to Verizon's voice service. As noted above, we approved the transfer of control of MCI's California utility subsidiaries to Verizon subject to three conditions, including the "naked" or "stand-alone" DSL requirement. (D.05-11-029, pp. 55-58, Ordering Para. 3(a).)[30] We found that the requirement was necessary to ensure that intermodal competition, such as VoIP, will remain viable. (*Id.*, p. 116; 55-58.)

According to Verizon, the Commission acted in excess of its jurisdiction in imposing this condition, and that the condition is preempted by federal law. Verizon points out that shortly before the we issued our Decision, the FCC issued an order determining that wireline broadband Internet access services, such as DSL service, are "information services" under the federal Communications Act.[31] According to Verizon, this FCC action divested the Commission's jurisdiction to regulate DSL service.

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[30] On January 17, 2006, Verizon sent a letter to the Commission's Executive Director requesting an extension of time to comply with Ordering Paragraph 3(a) of D.05-11-029. On January 30, 2006, the Executive Director granted Verizon's request for an extension of time to comply with Ordering Paragraph 3(a) until: (a) March 31, 2006 for provision of stand-alone DSL service to new customers who port their numbers to a facilities-based voice provider or wireless carrier and to those new customers who do not currently have Verizon voice service; and (b) January 6, 2007 for provision of stand-alone DSL service in those configurations where voice will be provided by a CLEC out of a remote terminal, or where a customer disconnects existing voice service without porting the number.

[31] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*

(continued on next page)

According to Verizon, where the Commission had previously asserted jurisdiction over DSL services it had done so on the ground that DSL services consisted of not only an information service component, but also a distinct "basic" or telecommunications service component that the Commission may regulate. (Verizon Rhg. App., p. 3.) Verizon asserts that this view of DSL service as having two distinct components was consistent with the FCC's regulatory regime prior to the FCC's *Broadband Order*, but that the FCC has now ruled that broadband Internet access service "is a functionally integrated, finished product, rather than both an information service and a telecommunications service." (*Broadband Order*, para. 105.) The FCC has found that this "single, integrated service" is an information service. (Id., para. 14.)

According to Verizon, Congress has expressed intent to occupy the field of regulation of information services and has expressed intent that information services remain free from state regulation, and therefore the Commission is preempted from exercising jurisdiction in this area. Verizon also points out that the Commission acknowledged that the FCC has "occupied the field" in the area of VoIP regulation in rejecting a condition that would prohibit the bundling of VoIP and DSL services. (D.05-11-029, p. 57.) According to Verizon, in light of the FCC's Broadband Internet Access Order, the Commission's reasoning regarding its lack of authority over VoIP services applies with equal force to DSL service since each is now an information service subject to the exclusive jurisdiction of the FCC. (Verizon Rhg. App., p. 6.)

Verizon also argues that the condition is invalid under the doctrine of conflict preemption because it conflicts with express federal policy of non-regulation of information services. According to Verizon, "the FCC has made clear that 'any state regulation[]' that would treat an unregulated information service as a telecommunications service or otherwise subject it to public utility regulation would 'almost certainly pose a conflict with our policy of nonregulation.'" (Verizon Rhg. App., p. 6, citing *In re*

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('*Broadband Order*"), FCC No. 05-150 (Sept. 23, 2005). The order went into effect on November 16, 2005. See 70 Fed. Reg. 60259 (Oct. 17, 2005).

Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service ("*Pulver.com Order*"), 19 F.C.C.R. 3307, para. 15 (Feb. 19, 2004).

Finally, Verizon argues that the Commission has no more authority to regulate information services through a merger condition under Section 854 of the Public Utilities Code than it could regulate such services directly. According to Verizon, federal law preempts all conflicting state law, be it Section 854 or any other state constitutional or statutory authority that the Commission may exercise. (Verizon Rhg. App., p. 8.)

We find that Verizon fails to establish grounds for rehearing for several reasons. First, Verizon fails to demonstrate that our action constitutes "regulation" of DSL service. We find that our decision does not "purport[] to dictate the circumstances in which Verizon must offer an information service…", as Verizon characterizes it. (Verizon Rhg. App., p. 6.) Rather, by exercising our undisputed authority over traditional local voice services, we are precluding Verizon from making regulated voice service a condition of purchasing DSL. Ordering Paragraph 3(a) provides:

> Verizon shall, by February 28, 3006, cease forcing customers to purchase separately traditional local phone service as a condition for obtaining DSL (this condition is commonly known as a requirement to provide "naked DSL"). We further order that no later than February 28, 2006 Verizon shall submit an affidavit evidencing compliance with this condition of the merger. (D.05-11-029, Ordering Paragraph 3.)

Our authority over intrastate regulated services like traditional local voice service allows us to regulate and limit the services that may be bundled with local voice. Accordingly, the language of this condition should be viewed as directed to the manner in which Verizon is authorized to provide local exchange service, not to how it provides DSL service. The condition imposes bundling limitations on Verizon's local exchange service, not its DSL service. (For this reason, Verizon's argument concerning our rejection of a condition preventing the bundling of DSL and VoIP services is inapplicable. Placing conditions on the bundling of a local voice service, which the

Commission has authority to do, is distinct from placing conditions on the bundling of two information services.)

Since we are not "regulating" DSL service, Verizon's arguments concerning federal preemption are largely irrelevant. We are not asserting regulatory jurisdiction over Verizon's DSL service, and Verizon fails to demonstrate how our decision imposes "common carrier obligations" on that service.

Verizon's argument that Section 854 does not extend the Commission's authority to regulate information services is similarly misguided and without merit. Verizon argues that we have no more authority to regulate information services through a merger condition under Section 854 than we could regulate such services directly. This argument, however, is based on Verizon's claim that the condition constitutes regulation of DSL, which is flawed for the reasons explained above. In addition, this Commission has previously recognized that it has jurisdiction to impose conditions on a merger that relate to federally regulated services. For example, in response to similar objections raised by Southern California Edison Company in its proposed merger with San Diego Gas & Electric Company, we stated:

> This Commission's statutory authority to determine whether the proposed merger should be authorized, based upon the assessment of competitive impacts and their potential mitigation (§ 854(b)(2)) is meaningfully exercised only if this Commission is free to engage in the full extent of the merger's impacts on California ratepayers. The statute requires that we assess whether the merger will impact competition. If that assessment requires us to take into account certain issues regarding interstate transmission and bulk sales, then that is what we must do.[32]

We are only imposing the stand-alone DSL requirement as a condition to support a our finding that the merger is in the public interest pursuant to Section 854. If

[32] *In the Matter of the Application of SCEcorp and its Public Utility Subsidiary Southern California Edison Company (U 338-E) and San Diego Gas & Electric Company (U 902-M) for Authority to Merge,* [D.91-05-028] (1991) 40 CPUC2d 159, 179.

Verizon decided not to go forward with the merger, it would not be required to implement this mitigation measure. Viewed in this context, the condition is within the scope of our jurisdiction under Section 854, and does not require us to exceed our jurisdictional authority. Moreover, we have no power to refuse to enforce Section 854 on the basis of federal preemption, unless an appellate court has made a determination that enforcement of the statute is prohibited by federal law or federal regulation. (Cal. Const. Art. 3, § 3.5.) Verizon cites no appellate court determination that the Commission's enforcement of section 854 is prohibited by federal law or regulation.

Finally, we not that eliminating the stand-alone DSL condition would require us to either impose additional mitigating measures on the merger transaction, or revisit the matter to determine whether the transaction is still in the public interest without such a condition. Part of our determination that the merger will not adversely impact the mass market local exchange is based on its finding that intermodal competition will continue to provide a check on future anticompetitive outcomes in the local exchange market. However, we found that in order for this to remain a viable check, consumers must have unfettered access to competitive VoIP services. (D.05-11-029, p. 55.) Therefore we found that the transaction will not have any anti-competitive effects on mass market local services, as long as the Applicants cease forcing customers to separately purchase traditional local phone service as a condition for obtaining DSL. (*Id*., p. 58.) In particular, we reached the following Findings of Fact:

> Intermodal competition will continue to provide a check on future anticompetitive outcomes in the local exchange market, but for this to remain a viable check in a consolidating and converging industry, consumers must have unfettered access to competitive VoIP services. (D.05-11-029, p. 122 [Finding of Fact 28.].)
>
> If consumers have unfettered access to competitive VoIP services, then the merger will have no anticompetitive impacts in the mass market for local exchange services. (D.05-11-029, p. 122 [Finding of Fact 29].)

> Without unfettered access to competitive VoIP services, the anticipated benefits of this transaction to consumers and the Commission's statutory obligation to promote access to advanced telecommunications services will be frustrated. (D.05-11-029, p. 122 [Finding of Fact 30].)

Accordingly, without the stand-alone DSL condition, we would need to revisit our conclusion that the merger will have no anticompetitive impacts on mass market local exchange services and consider whether other mitigating conditions can and should be adopted absent a stand-alone DSL requirement.

In sum, we find that Verizon's application for rehearing fails to demonstrate grounds for rehearing.

III. CONCLUSION

For the reasons stated above, the applications for hearing of D.05-11-029 filed by TURN and ORA jointly, and by Verizon and MCI jointly, are denied because no legal error has been shown.

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THEREFORE, IT IS ORDERED that:

1. Rehearing of D.05-11-029 is denied.
2. This proceeding is closed.

This order is effective today.

Dated April 27, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
JOHN A. BOHN
RACHELLE B. CHONG
DIAN GRUENEICH
Commissioners

Commissioner Brown reserves the right to file a dissent.
/s/ GEOFFREY F. BROWN
Commissioner

Commissioner Grueneich reserves the right to file a concurrence.
/s/ DIAN GRUENEICH
Commissioner

Dissent of Commissioner Geoffrey F. Brown

For the reasons stated in my earlier dissent (and that of Commissioner Grueneich) in D. 05-11-029, I remain unconvinced that this rehearing decision has addressed my and litigants' concerns about the procedural due process violations that permeated virtually every aspect of this proceeding. Simply stated, the assigned commissioner's approach, rulings, and analysis were unfair. The unprecedented and shifting legal rationales and the refusal to hear and consider contested evidence are emblematic of a process so preordained as to warrant a judicial imposition of a mandate for reconsideration. I wish this process were, in fact, close enough to being within the boundaries of acceptable procedure that I could swallow hard and vote to deny the rehearing. It was not.

For that reason, *inter alia*, I respectfully dissent.

Dated April 27, 2006, at San Francisco, California.

/s/ GEOFFREY F. BROWN
Geoffrey F. Brown
Commissioner